

CT 06-1

Tax Type: Cigarette Use Tax

Issue: Books and Records Insufficient

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**JANE DOE,**

**Taxpayer**

**Docket No. 00-ST-0000  
NTL No. 000000000 0  
IBT No. 0000-0000  
Account No. 0-00000**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Kent Steinkamp, Special Assistant Attorney General for the Illinois Department of Revenue

**Synopsis:**

The *prima facie* case of the Illinois Department of Revenue (hereinafter referred to as the "Department"), consisting of the notice of tax liability was established by admission of said document into evidence. The issue in this matter is whether *Jane Doe* owes cigarette tax, penalty and interest in the amount of \$2,350.39, with interest accruing, on the Internet purchase of cigarettes. The taxpayer timely protested the notice and a hearing was held pursuant to the request. It is recommended that the notice be finalized as issued. In support thereof, I make the following findings of fact and conclusions of law in accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 ILCS 100/10-50).

### **FINDINGS OF FACT:**

1. The Department's *prima facie* case was established by admission into evidence of Department's Exhibits 1 through 3. (Tr. p. 8)

2. The Department issued an ETS-51 Notice of Tax Liability for Cigarette Tax (hereinafter referred to as the "Notice") on December 5, 2006 to *Jane Doe* (hereinafter referred to as the "Taxpayer"), in the amount of \$2,313.00 for cigarettes purchased from July 3, 2001 through August 6, 2004. Taxpayer timely protested the Notice and requested a hearing. (Dept. Ex. No. 1)

3. The Department issued a final billing on March 3, 2006 showing an adjustment of \$724.86 and updated penalties and interest for a total balance due of \$2,350.39. The adjustment was pursuant to Board of Appeals Order, Docket No. 00-0000, which ordered that the penalty and interest normally assessed for Cigarette Use Tax against an Illinois purchaser buying cigarettes from an out of state vendor be waived on purchases made prior to the Department's notification of the Cigarette Use Tax obligation to the buyer. (Dept. Ex. No. 1)

4. Taxpayer and her husband both smoke. In 2004, Taxpayer smoked Marathon cigarettes. Taxpayer purchased cigarettes from eSmokes on line in 2004. (Tr. pp. 11-22)

5. Taxpayer went to the eSmokes website and verified her 38 cartons of cigarette purchases from March 1, 2004 through August 5, 2004. (Taxpayer's Ex. No. 1)

6. Taxpayer was notified that an attorney could represent her if she so desired. She chose not to have an attorney. (Tr. p. 9)

### **CONCLUSIONS OF LAW:**

The Cigarette Use Tax Act, 35 **ILCS** 135/1 *et seq.* imposes a tax on the privilege of using cigarettes in this State. 35 **ILCS** 135/2 Taxpayer asserts, in her protest, that the Department is

discriminating against smokers, that there is no proof that she received the purchases, no proof that she consumed them in Illinois, and that eSmokes.com, an Internet tobacco retailer, is responsible for the taxes owed. (Dept. Ex. No. 1)

The admission into evidence of the records of the Department under the certification of the Director at a hearing before the Department or any legal proceeding establishes the Department's *prima facie* case. 35 ILCS 135/13; Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1<sup>st</sup> Dist. 1987)

When the Department's Notice of Tax Liability was entered into the record under the certificate of the Director, its *prima facie* case was established, and the burden shifted to the taxpayer to overcome the Department's *prima facie* case. Anderson v. Dept. of Finance, 370 Ill. 225 (1938); Masini v. Dept of Revenue, 60 Ill. App. 3d 11, 14 (1978)

In this matter, Taxpayer, in fact, went on the eSmokes website and verified her 38 cartons of cigarette purchases from March 1, 2004 through August 5, 2004. The dates and amounts correspond with the Department's assessment.

Although Taxpayer asserted that she did not purchase cigarettes prior to that (Tr. p. 13), she offered no evidence to support its assertion. To overcome the presumption of correctness of the Department's *prima facie* case a taxpayer must produce evidence identified with books and records kept by the taxpayer. Oral testimony is not sufficient. A. R. Barnes v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988); Masini v. Department of Revenue, *supra*; Rentra Liquor Dealers, Inc. v. Department of Revenue, 9 Ill. App. 3d 1063 (1973)

In addition, Taxpayer admits that she smokes and that she smoked Marathon cigarettes in 2004. The letters sent to the Taxpayer from the Excise Tax Division of the Department, for the purchase periods from February 9, 2004 through July 22, 2004, show sales of thirty-nine cartons

of cigarettes. Thirty-eight of those cartons are Marathon Full Flavor King Size Box and one is a carton of Marathon Menthol Lights King Size Box. (Dept. Ex. No. 2)

Regarding the assertion that there is no proof that Taxpayer received the purchases and no proof that she consumed them in Illinois, the Cigarette Use Tax Act, at 35 **ILCS** 135/8, states that: “Evidence that cigarettes were sold by any person for delivery to a person residing or engaged in business in this State shall be *prima facie* evidence that such cigarettes were sold for use in this State.” Taxpayer has offered no evidence that the cigarettes were not used in the State.

In this matter, Taxpayer has failed to overcome the Department’s *prima facie* case. The law is clear that the Department can determine the amount of sales that should have been reported by using its best judgment and information. Anderson v. Department of Finance, *supra*. This is what the Department did in this case.

Taxpayer did not offer or present any probable evidence identified with her books and records to refute the Department’s *prima facie* case. Taxpayer has failed to overcome the Department’s *prima facie* case. Therefore, I recommend that the Notice of Tax Liability be made final.

Barbara S. Rowe  
Administrative Law Judge  
Date: September 26, 2006